

1 Tolbert in 2005. It talked about the compliance measures that
2 we've achieved with municipalities and other sources and it
3 went on to say because the majority of the phosphorus and other
4 pollutants of concern, such as bacteria and sediment, stem from
5 nonpoint source runoff, efforts to restore the scenic rivers
6 are obstructed by the lack of a similar commitment on the part
7 of the poultry integrator companies that operate in scenic
8 river watersheds to address the single largest contributor of
9 nonpoint source pollution, surplus poultry litter generated by
10 their farms.

11 We began negotiating with the poultry industry in
12 November of 2001. Those negotiations began in earnest in June
13 of 2002. After years of resultless negotiations, Oklahoma
14 finally filed this litigation in June of 2005. We withheld the
15 issuance of summons while another round of negotiations took
16 place in July of 2005. When those did not yield results, we
17 issued summons in August of 2005. We were delayed in getting
18 to court on this litigation because of an action that was filed
19 by the Attorney General of Arkansas in the United States
20 Supreme Court seeking leave of the United States Supreme Court
21 to file a petition in an attempt to enjoin Oklahoma's
22 enforcement of our standards and federal law. Finally, that
23 result, that effort was unsuccessful when the Supreme Court
24 declined Arkansas' request to file a petition.

25 So we are now off high center in this litigation. We

1 are approaching another rainy season. We are approaching
2 another season when high levels of poultry litter will be
3 applied to the land. The purpose of this motion here today,
4 which will be argued more extensively by Louis Bullock, is to
5 ask for an immediate order limited to allow discovery during
6 this rainy season, March, April and May, so we can find out
7 what the soil samples are, the runoff samples, and the water
8 samples during time of peak danger to the watershed.
9 Mr. Bullock will talk about the immediacy of this problem, the
10 danger to the watershed itself, and the danger to the public
11 health stemming from the pollution problems that are generated
12 by these plaintiffs.

13 The one item of curiosity that I have left with me,
14 Your Honor, is why these defendants are not joining with us in
15 this motion, why these companies are not as eager as we are to
16 find out for certain what the samples tell us, to find out for
17 certain what the degree of risk is, to find out for certain
18 what the danger is to the public health, to find out for
19 certain whether or not carcinogens are in our water supplies,
20 to find out for certain whether the next person who goes
21 swimming in Lake Tenkiller or the Illinois River is going to
22 come out with an E. Coli-produced damage to their public
23 health.

24 And I will now turn the microphone over to Mr.
25 Bullock. Thank you.

1 getting more frequent violations of the standard to the point
2 where if something is not done, if we don't move promptly on
3 this, you are going to have the average exceedance violated, as
4 well as these individual exceedances.

5 And in fact, that has happened, by the way, in Grand
6 Lake with the Langley Public Water Supply. They have actually
7 violated drawing their water out of Grand Lake, another
8 beautiful piece of water which has been seriously impacted by
9 the poultry industry. They have actually violated this, not
10 only with individual measures but also with an average.

11 Now, that's the reason why we need to proceed, Judge.
12 We need to proceed because the risks to human health are very
13 real. The dangers to people, whether they are swimming in the
14 water, whether they are drinking out of the wells, or whether
15 they are drinking out of the public water supply, there is a
16 real risk to people here. It is not imagined, it's not
17 hyperbole. We need to proceed promptly and we need to gather
18 the evidence at the time when it is being produced and that is
19 during the spring storms.

20 Exhibit 1 sets out in some detail the type of
21 discovery that we want the Court to allow. And both the
22 gathering of the waste, which both the waste -- gathering the
23 waste and gathering the soil, there are very clear protocols
24 for that where you have to set out a grid and collect random
25 samples over the extent of the field or the extent of the

1 house. And the reason for that is that there is a great
2 variation in any particular point as to how much contamination
3 that you will find.

4 In the houses, if somebody who wished to collect a
5 sample which showed a very low level of pollutants, it would be
6 easy to collect your samples along the walls rather than
7 collecting samples around the feeding troughs and watering
8 areas where it's more concentrated. A fair scientific sampling
9 requires that you take this grid across the entire house and
10 you composite it so that you get the type of sample that has
11 validity.

12 Similarly, with the soil. What we know about testing
13 soil is that if you just test in one place, particularly with
14 the nature of this waste, that you can sample one place and you
15 will find very little contamination. You sample another, such
16 as along where there's a gate or a fence line or places where
17 the waste hasn't been spread in that field. You also run into
18 the issue of, if you take your sample in a particular place,
19 that place may be where a whole clod of this fell, and so you
20 have to take a number of samples spread across the field to get
21 a fair reading on it.

22 The universities, Oklahoma State and Arkansas, their
23 only point of contention in terms of the sampling is with the
24 soil and that is the Oklahoma State University says take a six
25 inch sample, Arkansas says take a four inch sample. What we

1 intend on doing is taking a six inch sample, or six inch
2 samples, take actually three samples, take a two inch, a four
3 inch, and a six inch. Then what you have to do is composite
4 those, that is composite all of the two inch, all the four
5 inch, all of the six inch to get, for any particular field, a
6 fair measure of its level of contamination?

7 Edge of field is particularly important. As Dr.
8 Nelson has told us, you need to sample the storm water. Well,
9 a big part of the pollution, in fact, most of it which goes
10 into this watershed, comes during these storm events when this
11 loose material is picked up by the sheet flow and washed into
12 the creeks and streams. And so we need to be out there during
13 the storms when you have the sheet flow and you can collect
14 that, what we refer to as edge of field, what's washing off of
15 the field on the surface.

16 And then the final thing that we need to do is we need
17 to go out and we need to sample the groundwater underneath
18 these fields. As I described at the beginning, a great deal --
19 in fact, it was said by the director of the -- Benton County's
20 environmental director, he explained the karst geology as if
21 you spill it on the land today, you drink it tomorrow.

22 Now, we need to see what it is which is going into the
23 groundwater, so we need to go take samples. The way this is
24 done is with a Geoprobe where you can send down a tube about
25 two inches thick, go down, get to the groundwater and by

1 putting a pipe into that tube, you can then suck up the
2 groundwater, a sample of the groundwater. And then what we
3 will have to sort out -- and I know there will be a fight over
4 it -- what we would like to do is to establish some small
5 places in some of these fields where we could come back
6 repeatedly and take groundwater samples. That's a fight that
7 we believe is for another day but we certainly can discuss
8 that.

9 Those are the things that we want to do.

10 THE COURT: Your protocol, I don't want to interrupt
11 you, but when you are through talking about the protocol I
12 thought we needed to visit for a few moments.

13 MR. BULLOCK: Okay.

14 THE COURT: Obviously, this protocol is going to
15 become very important in this whole process, the specific, and
16 the devil is in the details. You've got four different areas
17 in which you want to sample. The first deals with poultry
18 houses only. The last three deal with fields on which litter
19 has been spread; is that correct?

20 MR. BULLOCK: Yes.

21 THE COURT: Okay. How are you going to know which
22 fields have had litter spread upon them?

23 MR. BULLOCK: Well, there's two ways that we can do
24 that. One way is the way that we have done it in the past and
25 that is by observation, by people out in the field who see it

1 being applied and then we have sampled, using public right of
2 ways, the runoff from those fields. So that's one way to do
3 it. Another way to do it would be for the defendants to
4 cooperate in this and tell us, and I will get to that
5 suggestion later. But those are the only two ways that I know
6 of to do it.

7 THE COURT: Okay. In regard to the poultry houses,
8 how many poultry houses are we talking about?

9 MR. BULLOCK: What we've asked for is the right to ask
10 for samples of three houses for each of the named defendants.

11 THE COURT: Okay. In other words, not houses owned by
12 the named defendants but houses --

13 MR. BULLOCK: Houses.

14 THE COURT: -- in which they own chickens.

15 MR. BULLOCK: Right.

16 THE COURT: And are they going to pick the houses or
17 are you going to pick the houses?

18 MR. BULLOCK: No, we will pick the houses.

19 THE COURT: Okay. And in regard to the fields, how
20 are you going to pick what fields you want and how many fields
21 are going to be checked?

22 MR. BULLOCK: What we will seek to do is to sample up
23 to three fields for each of these sites. Whether we will be
24 able to find that many where the waste has been applied, I
25 don't know, but that's what we would like permission to do.

1 THE COURT: You have three houses per defendant.

2 MR. BULLOCK: Right.

3 THE COURT: For each of those houses, you want to find
4 where that litter has been applied?

5 MR. BULLOCK: Right.

6 THE COURT: And do these three tests on the fields in
7 which the litter has been applied?

8 MR. BULLOCK: Correct.

9 THE COURT: So you've got how many defendants -- how
10 many houses are we talking about then, if we multiply three
11 times the defendants?

12 MR. BULLOCK: Some quick math guys. We'll get that
13 for you, Judge.

14 THE COURT: Okay. Yes, it's not -- I mean, when you
15 say defendants, it's kind of a moving target.

16 MR. BULLOCK: Well, for instance, Tysons has a number
17 of -- but we'd only look for three from the Tyson entities, not
18 three for each of the Tyson entities.

19 MR. EDMONDSON: Twenty-one.

20 MR. BULLOCK: Twenty-one.

21 THE COURT: So there are seven defendants?

22 MR. BULLOCK: Seven companies, some of them have
23 various iterations.

24 THE COURT: Seven companies. So you are wanting three
25 houses per company and appropriate fields to go with them. And

1 this groundwater sample, I didn't really understand the
2 protocol there. Are you going to try to push a pipe into the
3 ground or probe, if that didn't work you were going to use a
4 drilled. And then you are wanting to put in some sort of
5 permanent concrete pad?

6 MR. BULLOCK: We would like to do that. We feel that
7 it would be advantageous to both us and the owner of the field
8 that we are sampling on. And we think that some of the people
9 that we might sample would agree to that. It certainly would
10 be advantageous rather than later having to come back and again
11 stick a probe down and get other samples.

12 THE COURT: Okay. Well, I guess the background
13 question that comes up at this point, and that's the question
14 of what order do you want out of this Court?

15 MR. BULLOCK: Well, what we want is an order
16 permitting us to issue the necessary discovery to do this. We
17 well understand that for some of these places, not all of them
18 but some of these, there will be individual land owners who
19 need to be heard. And so the vehicle of the discovery we'll
20 have to work through in terms of where we decide to sample.
21 But for now, what we're asking for is just the permission to
22 begin to prepare that discovery, issue it and, have it heard.

23 THE COURT: If the Court grants you the request, then
24 in regard to third party poultry houses, you're going to have
25 to issue a Rule 45 subpoena; is that your thought?

1 MR. BULLOCK: Well, the houses -- we believe that the
2 defendants have access to those houses and, in fact, exercise
3 control over who can come into those houses. And we believe
4 that particularly as to the houses and the waste, they have
5 sufficient control to provide us with access to sample there.

6 THE COURT: So that's the question, is whether you are
7 going to proceed against these defendants with a Rule 34
8 application --

9 MR. BULLOCK: Right.

10 THE COURT: -- or whether you are going to go directly
11 to the property owners with a Rule 45 subpoena.

12 MR. BULLOCK: And that is something that we're -- that
13 we know we will have to sort out. Part of our issue there,
14 Judge, is a tactical one. Not so much of whether or not we
15 believe that the -- that we have any doubt as to the control,
16 but before we go that path we've got to be sure we can get that
17 issue sufficiently resolved within our narrow time-line to do
18 the effective discovery or whether it is more efficacious to,
19 even though unnecessary, to use subpoenas of the growers to do
20 that.

21 THE COURT: Okay.

22 MR. BULLOCK: Now, there are some of these houses
23 which we believe are actually owned by the companies and so for
24 those, we'd have ready access.

25 THE COURT: All right. So if I give you the order you

1 are requesting, then you're going to issue some Rule 34
2 discovery directed to these named defendants?

3 MR. BULLOCK: That and also subpoenas, third party
4 subpoenas to people whom we believe where the companies would
5 not have that control.

6 THE COURT: Okay. Then they are going to file an
7 objection stating they do not have physical possession,
8 custody, or control of this particular house, then you're going
9 to file a motion to compel, and then we're going to come back
10 and hear that issue later?

11 MR. BULLOCK: I think that's what we have to do,
12 Judge. Otherwise, we would be asking you to answer these
13 questions in the hypothetical. Those are questions which, I
14 think, necessarily have to be answered in terms of the
15 specifics. Some of these companies, we believe, have exercised
16 greater control than others. And some of them have effectively
17 barred us from going into the houses of the -- of their
18 growers. That type of control could be very meaningful but you
19 have to do it with the actual discovery there. At this point,
20 we can't even issue the discovery because of the whole issues
21 of Rule 26.

22 THE COURT: So you're not asking relief from the Court
23 today on that particular issue?

24 MR. BULLOCK: No, we're not asking that that be
25 pre-judged.

1 THE COURT: Are you asking for any discovery on the
2 properties within the state of Arkansas?

3 MR. BULLOCK: We may -- we will. At this point, of
4 course, while the subpoenas for inspection will have to be
5 issued out of Arkansas, at this point we don't have authority
6 to do that. It would be violation of this Court's prerogatives
7 for to us do it. So when we do that, we will have to go to the
8 court in Arkansas to get the right of third-party inspection to
9 the extent that that's necessary, to the extent that this Court
10 finds that -- that should this Court find that the defendants
11 do not have sufficient custody or control to grant us the
12 access.

13 THE COURT: Okay. What part do you expect the
14 defendants to play in the testing process? Are they going to
15 be there with you, are they going to get a sample when you get
16 a sample, or are you going to get a sample for them?

17 MR. BULLOCK: They will be allowed to accompany us.
18 We will tell them when we're going out and they can be there
19 and witness it. We will split samples with them. There's
20 nothing nefarious or behind anybody's back about the process
21 that we're asking the Court to allow us to engage in.

22 THE COURT: Okay.

23 MR. BULLOCK: The one issue that we have not discussed
24 at length is the whole issue of biosecurity on which the
25 defendants have placed a great deal of their objection. Now,

1 determine whether there is a right to do the sampling that
2 these people, by making an end run in this case, want to do on
3 these third party growers' farms.

4 I also share the very real concern that I expressed
5 with the Court that if we don't put this on a regular discovery
6 track, the next thing that's going to happen is that if the
7 Court permits this kind of discovery and if discovery takes
8 place, this case started out with a concern about phosphorus.
9 That was their original lawsuit. Then we started hearing about
10 copper, then they moved over to arsenic, and then today it's
11 trihalomethanes. After they take their samples, they may find
12 something else, they may have yet another theory. They are
13 casting about with a very laudable objective, and General
14 Edmondson, I think, spoke for everybody, he certainly spoke for
15 me when he expressed his concern about Oklahoma's interest in
16 protecting its watersheds.

17 The problem is if we start getting things out of
18 sequence, a problem is General Edmondson advised the Court that
19 we have dealt with these other concerns and he specifically
20 talked about the point sources. But there's a lot more to
21 that. For example, if you looked at the pie chart, if you take
22 their representation of the pie chart of sources of
23 phosphorus -- and that chart was about phosphorus now, not
24 trihalomethanes -- that chart made no distinction between any
25 nonpoint sources. That includes all of the growth of septic

1 MR. BULLOCK: No, sir.

2 THE COURT: Well, this is kind of a stair-stepped
3 process. I am going to rule from the bench. Maybe you could
4 see the railroad coming. I'm going to grant the request. The
5 question is what sort of an order to enter as a part of that
6 granting. I do want to do a written order. I think a matter
7 of this significance justifies a little case law. We have read
8 the Notaro case submitted by the defendants and find it
9 completely distinguishable. In fact, every key cite we found
10 on that case rejected it and found it to be distinguishable.

11 The proper standard is good cause to justify discovery
12 requests such as this. I think there is definitely good cause.
13 This lawsuit is about whether or not the Illinois River
14 watershed has been polluted by the application of chicken
15 litter, so obviously the samples requested are relevant. And
16 it would appear to me to be the more samples, the more
17 information you're going to get to get a good answer to the
18 question as to whether or not there has been harmful pollution.
19 So I am definitely going to grant the request that the
20 discovery be allowed.

21 I'm also going to either, through my office or through
22 Judge Kern, require that a joint status report be prepared so
23 that initial disclosures can begin as quickly as possible. I
24 mean, it's my interest to keep the matter moving as quickly as
25 we can, reasonably, and as requested by the parties.